

DONNA AND LARRY CHARPIED

NATIONAL PARKS AND CONSERVATION ASSOCIATION

IBLA 99-141, 99-150

Decided September 30, 1999

Appeals from decisions of the California State Director, Bureau of Land Management, granting two rights-of-way (CACA-25594 and CACA-31926) and denying protests against a proposed land exchange (CACA-30070).

Affirmed.

1. Environmental Quality: Environmental Statements--
National Environmental Policy Act of 1969:
Environmental Statements

Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), the adequacy of an EIS must be judged by whether it constituted a "detailed statement" that took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. In general, an EIS must fulfill the primary mission of that section, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action. In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. An EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. The question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. Where BLM has complied with the procedural requirements of

section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or other decisionmaker.

2. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM may dispose of lands by exchange under section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), where it determines that the public interest will be well served by making that exchange. In deciding what is in the public interest, BLM is required to fully consider the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including protection of fish and wildlife habitats, consolidation of lands and/or interests in lands for more logical and efficient management and development; expansion of communities; promotion of multiple-use values; and fulfillment of public needs. In making this determination, BLM must find that the intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands. BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination. A decision approving a land exchange will be affirmed where the record shows that BLM met these requirements.

3. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

Section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (1994), requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. A party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value, failing in which the BLM appraisal is properly upheld.

4. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Section 501(a)(6) of FLEMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Department to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. Approval of rights-of-way is a matter of discretion. The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application where the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice.

APPEARANCES: Donna and Larry Charpied, Desert Center California, pro sese; Deborah A. Sivas, Esq., and Alicia Thesing, Esq., Stanford, California, for National Parks and Conservation Association; Perry M. Rosen, Esq., Thomas D. Roth, Esq., and William G. Malley, Esq., Washington, D.C., for Respondents Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation; David Nawi, Esq., John R. Payne, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Donna and Larry Charpied (the Charpieds) and the National Parks and Conservation Association (NPCA) have appealed from two separate December 9, 1998, decisions of the California State Director, Bureau of Land Management (BLM), granting two rights-of-way (CACA-25594 and CACA-31926) and denying their protests against a proposed land exchange (CACA-30070). By order dated March 5, 1999, we consolidated the appeals (the Charpieds' (IBLA 99-144) and NPCA's (IBLA 99-150)), granted expedited consideration, stayed the approval of the land exchange pending our review of the appeals, denied a stay of the granting of the two rights-of-way, and granted the petition of Kaiser Eagle Mountain, Inc. (KEM), and Mine Reclamation Corporation (MRC), to intervene as Respondents.

The procedural history of this matter is long and the case record voluminous. It is sufficient to note that BLM has been processing a land exchange proposal submitted in 1989 by KEM to facilitate construction and operation of the Eagle Mountain Landfill and Recycling Center Project (the Project), an enormous solid waste municipal landfill to be constructed on a privately-owned unreclaimed open pit iron ore minesite located in eastern Riverside County, California, approximately 1-1/2 miles from the Joshua

Tree National Park (JTNP), at its nearest point. 1/ The Project also includes the planned renovation and repopulation of the adjacent area known commonly as the Kaiser "campsite" to provide housing for Project workers.

1/ As stated by the California Court of Appeal,

"[t]he Eagle Mountain open pit iron ore mine was the location of extensive mining operations by Kaiser Steel Corporation [KSC] from 1948 to 1983. The mine is located approximately 200 miles east of Los Angeles, 50 miles west of the Arizona border, 10 miles north of Desert Center, and approximately one and one half miles south of [JTNP]. The mining operation resulted in the excavation of three large open pits; each[] one to two miles long. The mining operations ceased in 1983, and Kaiser has leased the mine site to [MRC], the prospective operator of the landfill.

"[MRC] plans to utilize the open pits left from the mining operation to create what all parties have agreed is the largest landfill in the country. The landfill footprint will encompass approximately 2,262 acres with a larger project area of 4,654 acres. The landfill will have the capacity to accept up to 20,000 tons per day of wastes for a minimum of 115 years." National Parks & Conservation Assn. v. County of Riverside, 42 Cal.App. 4th 1505, 1509-10 (1996) (NPCA I) (quoting Trial Court).

In its more recent decision, the Court of Appeal added:

"The landfill will fill in areas left by the huge pits of the mining operations (farthest from the Park, to begin with) and will also fill in nearby canyons and hillsides which already contain the waste material from mining operations. A six-inch layer of dirt and mine debris will be placed daily upon the fill material. In addition to the landfill, the project will include the operation of a 52-mile railroad line and the upgrading of a county road, both for purposes of bringing in the trash for processing. Also, an existing campsite in the area, an outgrowth of a previous company town run by the mining company, will be expanded to serve the workers at the landfill. Currently, the campsite has a few hundred residents and a privately run prison facility operates there, housing 500 prisoners.

"The site of the landfill project is about one and one-half miles from the nearest Park boundary, as established in 1994 when the Park was converted from a national monument to a larger national park through the federal California Desert Protection Act, which expanded the Park boundaries. (16 U.S.C. § 410aaa-21 et seq.) The areas between the site and this portion of the Park boundary include infrastructure such as an aqueduct, a pump station, utility and communication lines, roads, and another employee townsite." National Parks & Conservation Assn. v. County of Riverside, No. D031056 (Slip Opinion at 5-6, May 7, 1999) (NPCA II).

KSC operated an open pit iron ore mine at this site (on patented mining claims) from 1947 to 1982, when large-scale mining operations ceased. Shipping of iron ore and other activity continued for some time thereafter, but KSC declared bankruptcy in 1987, emerging from bankruptcy in 1988 as Kaiser Steel Resources (KSR). Recognizing the site's potential as a landfill, KSR leased the Eagle Mountain site to MRC to develop the Project. (KEM/MRC Answer at 6-7.) MRC and KEM jointly pursued applications for the project.

Our review of the record shows that the landfill is described

as a "Class III, non-hazardous, solid waste landfill" comprising about 2,164 acres. In addition to the landfill, the project area would consist of about 2,490 acres for buffer and ancillary features. (Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) at ES-2.)

150 IBLA 317

The present appeals arise because, on September 25, 1997, BLM's California Desert District Office (CDDO) Manager issued a Record of Decision (ROD) announcing that he "approved the land exchange" (CACA-30070) between KEM and the United States (ROD at 1), and that a final decision to issue two rights-of-way to KEM would be withheld "pending receipt and review of any protest to the land exchange." 2/ BLM received protests against that ROD, including those by the Charpieds and NPCA. On December 9, 1998, the California State Director, BLM, issued decisions denying those protests. The State Director also announced that BLM would issue the two rights-of-way pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1761 (1994), and 43 C.F.R. § 2804.1(b). The Charpieds and NPCA have appealed from the denial of their protests and also challenge the decision to grant the rights-of-way.

The State Director's decision cleared the way for the exchange of approximately 3,481 acres of public land and the reversionary interest held by the United States in the surface estate of approximately 460 acres of private land (selected public lands), 3/ to KEM in return for 10 parcels owned by KEM totaling approximately 2,846 acres (offered private lands) plus a cash payment of \$20,100, representing the cash value difference in valuations. (ROD at 2, 19.) 4/

The parcels of selected public lands are scattered around the fringes of the private land where the iron ore mine is situated. (Appraisal Report Vol. II at 33; ROD Ex. B; Draft EIS/EIR Technical Appendices [5/] Vol. II,

2/ BLM's announcement in the ROD that it had "approved the land exchange," viewed by itself, suggested that BLM was issuing an immediately appealable decision to approve the exchange. However, from BLM's statement that it expected to receive and adjudicate protests against the action, it is apparent that BLM was announcing that it was merely proposing to approve the exchange at that time. No protest would have been available unless the action was "proposed to be taken." See 43 C.F.R. § 4.450-2.

3/ See ROD Ex. A-1.

In 1955, the United States issued Patent Los Angeles 0121702 conveying the surface estate in 465.85 acres to KSC for campsite and millsite purposes, pursuant to section 3 of the Act of July 8, 1952, Priv. L. No. 790, 66 Stat. A130. The patent provided that title to the surface estate would revert to the United States if it was not used "for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of [KSC] or its successors in interest." This Federal "reversionary interest" was expressly included in the selected public lands. (ROD at Ex. A-1 p. 3.)

4/ See ROD at 9-10; Ex. A-2. The reference elsewhere in the ROD to seven parcels owned by Kaiser (ROD at 19) relates to the Appraisal Report, which grouped the 10 parcels of offered private lands into 7 groups by combining some parcels of contiguous lands for appraisal purposes. (Appraisal Report, Vol. III at 2, 43-70.)

5/ The EIS/EIR that was approved in January 1997 adopted most of the discussion of environmental consequences set out in the July 1996 Draft

EIS/EIR, making only what are described as "minor changes in the description of the environmental consequences, resulting from public and agency comments." (Final EIS/EIR at 4-1.) As a result, much of the substance of the EIS/EIR appears in the Draft EIS/EIR.

150 IBLA 318

p. A-3.) Review of the plans submitted by KEM shows that use of these lands is integral to the planned operation of the Project. None of the selected public lands is contiguous to lands within JTNP. See ROD Ex. B.

The 10 parcels of offered private lands are scattered along the route of an existing rail line running to the landfill site from the Southern Pacific Railroad at Ferrum Junction, near the Salton Sea. Id. Their acquisition would generally consolidate public landholdings administered by BLM. Three of the parcels of offered private lands ("Group C") are situated within the Chuckwalla Bench Area of Critical Environmental Concern (ACEC) (ROD at 10); 6/ three ("Group A") are situated in the vicinity of the Salt Creek (Dos Palmas) ACEC (ROD at 9); 7/ three ("Group B")

6/ The Chuckwalla Bench ACEC is situated 13 miles south of the Project site and provides habitat for the desert tortoise (Gopherus agassizii), a Federally-listed threatened species under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531 through 1544 (1994). See 50 C.F.R. § 17.11(h).

7/ The Salt Creek (Dos Palmas) ACEC is situated 30 miles southwest of the Project and encompasses a tributary of the Salt Creek, which provides habitat for the desert pupfish (Cyprinodon macularius), a Federally-listed endangered species.

BLM noted in the ROD that the "entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands." (ROD at 9.) The ACEC is referred to as the "Dos Palmas/Salt Creek ACEC" elsewhere in the ROD. (ROD at Ex. B.)

The Charpieds make much of inconsistencies in the nomenclature for the Salt Creek (Dos Palmas ACEC), asserting that "this ACEC is known as the Salt Creek Pupfish/Rail ACEC, and is only popularly known as Dos Palmas in the deep recesses of [BLM's] mind, ever since the first [notice of realty action (NORA)] was issued in 1992." The Charpieds fail to show how the difference in nomenclature has any significance.

The Charpieds assert that BLM has somehow changed the ACEC boundaries without notifying the public and that BLM claims "this ACEC to be more than legally designated * * * because they cannot justify acquiring all of those Kaiser railroad lands which are not in or abutting that critical habitat known as Salt Creek." (Charpieds' Statement of Reasons (SOR) at 18.) This misconception apparently arises from the fact that BLM referred to "the entire ACEC area" as having 14,000 acres instead of 4,253 acres as calculated by the Charpieds. That discrepancy is fully explained by BLM. (BLM Answer at 12-13.) The boundary of the ACEC encloses approximately 14,000 acres, referred to by BLM imprecisely as the "entire ACEC area," which included both Federal lands and non-Federal lands. However, the ACEC actually consists only of Federal lands managed by BLM within the boundaries of the ACEC, which total much less.

To the extent that the Charpieds argue that BLM surreptitiously enlarged the ACEC to justify the land exchange, they are simply mistaken. The boundary of the ACEC (originally denominated "ACEC 60") does not

appear to have changed since 1984. (See BLM Answer, Ex. G-6.)

Determining the acreage of the ACEC itself is apparently simply a matter of identifying Federal lands within the ACEC boundary.

BLM's statement that three of the parcels of offered private lands "are located in the vicinity of the Salt Creek (Dos Palmas)" ACEC is entirely accurate.

150 IBLA 319

are situated near the southern boundary of the Orocopia Mountains Wilderness Area; and one ("Group D") is situated in an area designated by the U.S. Fish and Wildlife Service (FWS) as critical habitat for the desert tortoise that is "adjacent to a large block of BLM managed lands to the north," although it "is not inside any specially designated management area." (ROD at 10.) The offered private lands conveyed to BLM by KEM will become part of the California Desert Conservation Area (CDCA) pursuant to 43 C.F.R. § 2200.0-6(f). (ROD at 2.) The offered private lands are and will continue to be crossed by a rail line connecting the Project with the Los Angeles metropolitan area.

Right-of-way grant CACA-25594 (the "rail line right-of-way"), issued to KEM, authorizes use of a 28.6-mile corridor through scattered Federal lands along the existing 52-mile Eagle Mountain rail line between Eagle Mountain and Ferrum Junction. The rail line right-of-way would also allow the construction of a new rail spur from the terminus of the existing rail line to the landfill site. (Draft EIS/EIR at 1-18, Fig. 2-12.) It also authorizes a 3-mile extension of the Eagle Mountain Road from the Metropolitan Water District of Southern California's (MWD's) pumping station to the landfill site. (ROD at 3.) The rail line right-of-way crosses each parcel group of offered private lands. (ROD at Ex. B.) Right-of-way grant CACA-31936 (the "roadway right-of-way"), issued jointly to KEM and MWD, authorizes the use of 6.75 miles of existing roadway (the Eagle Mountain Road) from north of Interstate 10 to the site. (Draft EIS/EIR Fig. 2-4.) Both rights-of-way are intended to allow haulage of waste materials across public land to the Project. 8/

It is conceded by all parties that, without approval of the exchange and right-of-way grants, the Project will not go forward. BLM served as the "lead agency" in preparation of an EIS, as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994), as a prerequisite to undertaking any "major Federal action having a significant impact on the quality of the human environment." 9/ See, e.g., Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982). The County of Riverside (the County) served as the lead State agency to comply with the California Environmental Quality Act (CEQA), California Federal Resources Code § 21000. Together, starting in 1995, these agencies prepared the current joint Federal EIS/California State EIR (EIS/EIR), publishing a draft EIS/EIR in July 1996. 10/ Following receipt and consideration of extensive

8/ The rail line right-of-way replaces an existing right-of-way (LA-0121701) granted to KSC pursuant to Priv. L. No. 790, supra. The roadway right-of-way replaces an existing R.S. 2477 right-of-way.

9/ The National Park Service (NPS) and the Biological Resources Division of the U.S. Geological Survey (formerly the National Biological Service), both agencies of the Department of the Interior, served as "cooperating agencies" under NEPA.

10/ This was the second EIS/EIR that was prepared for this project. The first was completed in July 1992, but was recalled by BLM for further

consideration of relevant environmental issues, including impacts (air quality, wildlife, and other resources) of the Project on JTNP and on the desert tortoise. BLM explains that it prepared the new document to comply with a State Court order. (Draft EIS/EIR at ES-5.)

150 IBLA 320

public comment, BLM and the County published the final EIS/EIR in January 1997. This EIS/EIR properly considered the environmental effects of the entire project and alternatives, not just impacts on the affected Federal lands. See 40 C.F.R. § 1508.8(b) (requiring consideration of "indirect effects") and 40 C.F.R. § 1508.27(b)(7) (requiring consideration of "cumulative impacts"). ^{11/} In appealing the State Director's decisions, the Charpieds and NPCA have challenged the adequacy of the EIS/EIR as a basis for his action.

[1] It is well established that, under section 102(2)(C) of NEPA, the adequacy of an EIS must be judged by whether it constituted a "detailed statement" that took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (1994); Colorado Environmental Coalition, 142 IBLA 49, 52 (1997), and cases cited. In general, an EIS must fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. §§ 1500.1(b) and (c); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. As the Court stated in County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978),

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive

^{11/} BLM reviewed not only the BLM/Kaiser land exchange and FLPMA right-of-way authorizations, but also the utilization and eventual reclamation of the

iron ore mine for use as a municipal solid waste landfill and the renovation of the adjacent Eagle Mountain Campsite.

150 IBLA 321

decision would have been reached by this Board or other decisionmaker. See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227! 28 (1980), and cases cited. As we said in Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1990):

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

In order to overcome BLM's decision to proceed with this land exchange and issue these rights-of-way, appellants must carry the burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. See Colorado Environmental Council, 142 IBLA at 52.

The Charpieds complain that the EIS/EIR incorrectly determined that the impact of the project on JTNP will be "insignificant." See Draft EIS/EIR at 4.5-16. The question of whether individual adverse impacts have been reduced to insignificance is not presented in relation to the adequacy of the EIS/EIR. ^{12/} If BLM has met its obligation to take a "hard look" at the environmental effects of the Project (including, but not limited to, effects on JTNP), it need not show that every impact has been reduced to insignificance. ^{13/} Instead, a Federal agency is required to discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated"; it is not under any "substantive requirement that a complete mitigation plan be actually formulated and adopted." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989); see National Wildlife Federation, 145 IBLA 348, (1998). Therefore, even if we could agree that the finding in the EIS/EIR that the effects on JTNP (or other environmental impacts) could be reduced to insignificance is erroneous, the EIS would not be rendered invalid under applicable precedent.

^{12/} As discussed below, the question of whether there would be significant impacts is relevant to whether "the public interest will be well served by making" the land exchange under 43 U.S.C. § 1716(a) (1994).

^{13/} The joint EIS/EIR contains findings of significance or insignificance for each particular impact examined because California law requires it in an EIR. Cal. Public Resources Code § 21100; Cal. Code Regs. § 15126. CEQA also mandates that all "significant" impacts be mitigated to insignificance if feasible. See Cal. Code Regs. §§ 15091, 15092, and 15093.

The County, by approving the project based on the EIS/EIR, implicitly concluded that this was the case. The California Court of Appeal has subsequently ruled that the County's findings were supported by substantial evidence in the EIS/EIR and must accordingly be affirmed. See NPCA II at 4-5. The Supreme Court of California denied NPCA's Petition for Review of

NPCA II on July 21, 1999.

150 IBLA 322

Nevertheless, we can agree that the EIS/EIR could not be considered adequate under applicable precedent unless it contains a full analysis of the effects of the Project on JTNP, which is plainly a "relevant matter of environmental concern." Applying that precedent, we conclude that there is no doubt that BLM, in concert with NPS (the agency delegated the responsibility of managing JTNP), has taken a hard look at environmental effects on JTNP. Review of the EIS/EIR reveals that BLM carefully considered the effects of the Project on JTNP. ^{14/} Further, the case record discloses that the EIS/EIR was only the end product of an extensive review by BLM and FWS concerning present and long-term effects of the Project on JTNP. Respondents recite the following history:

When the decision was made [in 1995] to prepare the new EIS/EIR, BLM invited the NPS to participate as a "cooperating agency" in the preparation of the new document -- a role that would recognize NPS' special expertise in evaluating impacts on the newly designated JTNP.

At the scoping stage, the NPS submitted a 12-page letter outlining issues that it wanted to see addressed in the EIS/EIR. With the assistance of the consultant preparing the EIS/EIR, BLM reviewed these issues one by one, held a series of meetings with the NPS staff, and incorporated many of the NPS's recommendations into the Draft EIS/EIR. Before the Draft EIS/EIR was issued, BLM provided an "administrative draft" of the document to NPS for review, and the NPS provided more than 150 pages of comments. Again, BLM responded point by point to NPS's comments in a 34-page response. BLM accepted many of the NPS's recommendations and provided detailed explanations for those it declined to accept. When the Draft EIS/EIR itself was issued, the NPS submitted a third round of comments, even more detailed than the last. Again, BLM painstakingly reviewed the NPS's comments and addressed each of them.

As the new EIS/EIR was being prepared, the NPS again raised the issue of the project's potential unknown and unpredictable impacts, as it had in 1992. To address this concern, MRC revived an idea that the NPS itself had proposed during preparation of the first EIS/EIR -- namely, entering into an agreement that would establish a long-term mitigation and monitoring program. Over the next 18 months, MRC and the

^{14/} For example, section 4.5.3.1 of the Draft EIS/EIR discusses visual, night lighting, and noise impacts on JTNP and describes mitigation measures; section 4.10.2, more fully discusses visual impacts on JTNP; section 4.1.2.1 finds that quality of ground-water in JTNP will not be degraded; section 4.10.3 addresses the effects of windblown debris and dust on JTNP and mitigation measures; section 4.2.3.2 considers the effect of landfill gas condensate on JTNP; section 4.11.3.1 addresses "skyglow" impacts on wilderness portions of JTNP, and section 4.10.4 of the Final EIS/EIR

establishes mitigation measures. See also Draft EIS/EIR, Table 1-1 (citing 20 sections discussing impacts on JTNP).

150 IBLA 323

NPS engaged in extensive discussions to develop a detailed, enforceable agreement. In the end, MRC and NPS entered into a binding agreement that gives NPS precisely what they had requested as early as 1992 -- a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and address any unforeseen impacts on JTNP. While the NPS made it clear that it would prefer to avoid any industrial-type activity at the mine site, the agency agreed that if the landfill project were to go forward, the agreement with MRC provided the appropriate safeguards for addressing NPS's concerns about any gradual, long-term impacts (which cannot be accurately predicted).

(KEM/MRC Answer at 13-15 (references and footnote omitted).) The case record fully supports the accuracy of this statement.

It is also important that NPS agreed with all of the findings in the EIS/EIR concerning the significance of effects. See NPS Agreement; Letter dated July 11, 1997, from John J. Reynolds. ^{15/} It is clear that BLM did not substitute the NPS Agreement for the analysis in the EIS/EIR. Rather, BLM's review of effects on JTNP was extensive and included NPS, the agency responsible for maintaining JTNP. Acquiring NPS' opinions on the subject of mitigating adverse impacts on JTNP was plainly an essential part of BLM's efforts to take the required "hard look."

The Charpieds also complain that it has not been established that impacts on the desert tortoise have been reduced to a level of insignificance. (Charpieds' SOR at 34.) Impacts to the desert tortoise were discussed at sec. 4.7.3.2 of the Draft EIS/EIR where it was noted that tortoises could be killed, their reproduction reduced, and their habitat lost in several ways attributable to operation of the rail line and the landfill. (Draft EIS/EIR at 4.7-5-8.) The Draft EIS/EIR concluded that

[d]irect loss of individual adult or juvenile animals in excess of one animal per year, as specified in the Biological Opinion (USFWS, 1992), reduction in reproductive success in desert tortoise populations, loss of habitat for the tortoise in the immediate vicinity of the Project site, and increase in juvenile tortoise mortality from increased predator populations in

^{15/} In that letter, John J. Reynolds, Regional Director for the Pacific West Regional Office, NPS, stated:

"There are, and will continue to be unresolved issues concerning this project, if approved. That would be true with the siting of any industrial activity in this or any location. * * * Because of these potential unknown and unpredictable impacts, the NPS entered into the Agreement with MRC, to provide [JTNP] with the means to identify and resolve such impacts if they occur. In the Agreement both parties acknowledge the accuracy of the [EIS/EIR] analysis regarding known impacts. The Agreement further states that the NPS and Kaiser/MRC agree that 'the mitigation measures proposed, if

implemented, reduce the known effects of the Project on the Park (except for the potential effects on the wilderness experience) below the levels of significance as required by CEQA."

150 IBLA 324

JTNP could occur as a result of one or more of the potential effects listed above. This loss would be considered a significant adverse impact.

(Draft EIS/EIR at 4.7-8.) The Draft EIS/EIR proceeded to set out in detail mitigation measures for the Project that would avoid or minimize impacts to tortoises during construction and operation of the Project. Thirty-nine specific protective mitigation measures were set forth. (Draft EIS/EIR at 4.7-20-28.) The Draft EIS/EIR contains an extensive analysis of the these measures' efficacy in protecting tortoises in some 263 other projects that had been authorized in desert tortoise habitats by FWS. (Draft EIS/EIR at 4.7-31 to 4.7-36, Appdx. G at 3-32 to 3-39.) Finding that the FWS-mandated mitigation measures had been effective in reducing tortoise mortality to acceptable levels (Draft EIS/EIR, Appdx. G at 3-39,) the Draft EIS/EIR concluded, "Because implementation of the recommended terms and conditions for this and other projects will reduce the potential numbers of tortoises killed to less than that authorized, the potential impacts would be reduced to below the level of significance." (Draft EIS/EIR at 4.7-36.)

The Final EIS/EIR also imposed additional protective measures by increasing the area of desert tortoise habitat that BLM will receive from KEM from 375 to 400 acres as mitigation for an additional 10 acres of desert tortoise habitat that would be destroyed by the Project. Further, BLM expanded control measures for ravens, which are known to prey on desert tortoises, to cover the Campsite area. (Final EIS/EIR at 6-20.)

Once again, BLM is not required by applicable law to show that impacts on the desert tortoise would be insignificant. Those findings have no bearing on the adequacy of the EIS/EIR under Departmental law. Nevertheless, we must consider whether effects on the desert tortoise were fully addressed in the EIS/EIR, because it could not properly be considered adequate without such analysis. The record amply demonstrates that BLM took the requisite "hard look" at this issue. Section 7 of the ESA, 16 U.S.C. § 1536 (1994), requires that BLM consult with FWS to evaluate the landfill project's potential impacts on threatened and endangered species, including the threatened desert tortoise and endangered desert pupfish. Following initiation of consultation with BLM, FWS issued Biological Opinion 1-6-92-F-39, dated September 10, 1992, addressing the effects of the proposal on the desert tortoise and imposing site-specific protective limitations on MRC's operation of the rail line and landfill, including 28 mitigation measures that would "alleviate impacts to desert tortoise and desert pupfish."

FWS reaffirmed the validity of the 1992 Biological Opinion in September 1993, following a Departmental proposed designation of critical habitat for the desert tortoise, and again in September 1996, following review of the amended Draft EIS/EIR. BLM expressly adopted the mitigation measures specified in the FWS Biological Opinion, among others. (ROD Ex. C, 17-21.)

The Charpieds also challenge the adequacy of the environmental

review of effects of the Project on groundwater, noise impacts on JTNP,
noise impacts on animals (Charpieds' SOR at 25), impact on JTNP of

150 IBLA 325

"skyglow" from the Project (Charpieds' SOR at 24-26) and from repopulating the campsite (Charpieds' SOR at 26), impacts on visual resources (Charpieds' SOR at 27-28), and the impacts of possible "eutrophication." (Charpieds' SOR at 29-30.) ^{16/} As before, the issue of what standards were used in the EIS/EIR to determine whether there were "significant" impacts from these effects (Charpieds' SOR at 22, 24-28) is not presented in the context of our review of the adequacy of the EIS/EIR. We must instead review each issue to determine whether the effects cited by the Charpieds are "relevant matters of environmental concern" or constitute "probable environmental consequences," such that BLM was required to present a "reasonably thorough discussion" of them as part of its requisite "hard look." The record shows that the EIS/EIR satisfies BLM's obligation to take a "hard look" at such impacts.

Noise impacts on animals (including impacts on sensitive species including the desert tortoise) were not only analyzed (Draft EIS/EIR at Secs. 4.7 and 4.13), but mitigation measures were developed to reduce the Project's impact on those species. See, e.g., Draft EIS/EIR at 4.7-30. The analysis of noise impacts is not rendered inadequate because it takes notice of the fact that the campsite, which is closer to the landfill project, would be exposed to greater noise impacts than JINP. (Draft EIS/EIR Fig. 4.13-1 at 4.13-5.) Effects on groundwater quality and use were also extensively considered (Draft EIS/EIR at Sec. 4.1), including a Technical Memorandum on the subject. (Draft EIS/EIR, Appdx. C-1.)

We find nothing improper in using "key observation points" (KOP's) to assess impacts on visual resources. The BLM Manual Handbook provides that an individual completes a Visual Resource Management contrast rating "from key observation point(s) using Bureau Form 8400-4 -- Visual Contrast Rating Worksheet." (BLM Manual Handbook 8431-1, at 2.) The four KOP's within JINP were selected in consultation with NPS. (Draft EIS/EIR at 4.10-3 to 4.10-4; Letter from Tom Peters, CH2M Hill, to Ernest Quintana, JINP, dated Aug. 15, 1995.) Four additional KOP's were selected outside JINP. We do not find BLM's assessment of impacts on visual resources (Draft EIS/EIR at Sec. 4.10.2) inadequate. The EIS/EIR also analyzed the visibility of

^{16/} "Eutrophication" is a process, associated with aging aquatic ecosystems such as lakes, whereby concentrations of phosphorus, nitrogen, and other plant nutrients increase, altering the ecosystem by algae blooms or microscopic organisms. "Cultural eutrophication" occurs when the aging process is sped up by the activities of humankind by allowing excess nutrients in such forms as sewage, detergents, and fertilizers to enter the ecosystem. Encyclopedia Britannica, Micropaedia Vol. III at 1007 (1979).

In the present context, NPS used the term "eutrophication" to refer to the addition of nutrients (in garbage and trash) to the desert ecosystem, raising the possibility that the ecosystem would be upset by the proliferation of animal life such as insects and rats. NPS requested that this possibility be examined in the EIS/EIR process. NPCA II at 29-30.

The Charpieds assert that BLM failed to adequately assess "impact of the dump adding a large volume of nutrients into an environment which has

been nutrient scarce for thousands of years." (Charpieds' SOR at 29-30.)

150 IBLA 326

"plumes" that would be emitted from landfill gas flares, based on the Environmental Protection Agency's (EPA's) technical guidance for evaluating the visibility of plumes. (Final EIS/EIR, Response to Comment 1-87; Draft EIS/EIR Sec. 4.4.1.)

The EIS/EIR addressed "eutrophication" and roadkill. (Draft EIS/EIR at Sec. 4.7.4, ROD at 15; Final EIS/EIR at 7-22 to 7-24; Response to Comments 1-123 and 1-153.) The Charpieds fail to specify how this assessment is deficient and thus fail to meet their burden of showing error in BLM's review. Effects of night lighting were addressed. (Final EIS/EIR Sec. 6.6.)

To the extent that appellants fault BLM for not considering the possibility that mining of the site will resume at some point in the future, compounding environmental questions, this issue goes beyond presently foreseeable effects. BLM's approval of the Project is subject to ongoing monitoring to determine whether additional adverse impacts to the ecosystem eventuate.

NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). That is, although NEPA requires an agency to prepare an EIS where significant impacts are identified (as BLM did here), nothing in NEPA restrains an agency from proceeding with an action that will have significant impacts where it decides that other values outweigh the environmental costs. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989); Paul Herman, 146 IBLA 80, 102 (1998). The purpose of preparing the EIS is to inform the agency of possible adverse environmental effects in hopes that the agency can mitigate them. This expectation was well rewarded in this case. As discussed herein, BLM did not disregard the adverse effects identified in its EIS/EIR, but proceeded to carefully consider them (as well as six other alternatives (ROD at 3)) and develop mitigating measures ^{17/} to reduce or eliminate them, in consultation with Departmental agencies responsible for the subjects presented. We find no basis to disturb its decision.

[2] Turning to the question of whether the land exchange satisfied the requirements of FLPMA, it is appropriate to set out BLM's findings on this question. The CDDO Manager ruled as follows in the ROD concerning the exchange:

Based on the environmental analysis of the proposed action and alternatives, I have determined that the land exchange * * * as conditioned by the adoption of mitigation

^{17/} MRC is also required to implement a comprehensive, detailed mitigation plan, including the establishment of an Environmental Mitigation Trust, the proceeds of which are to be used to purchase habitat for protection from development. See Draft EIS/EIR at 1-5 to 1-6. Further, the Project is

replete with monitoring measures to ensure that any unforeseen adverse environmental impacts are timely identified.

150 IBLA 327

and monitoring provision[s] * * * will not cause unnecessary or undue degradation to Federal lands and resources and [is] in the public interest. Further, I have determined that the conveyance of the Federal lands will not significantly conflict with established management objectives on adjacent Federal lands.

(ROD at 1.) The District Manager added:

In accordance with Section 206(a) of FLPMA and [43 C.F.R. § 2200.0-6 of the exchange regulations], I have given full consideration to better Federal land management and the needs of State and local people and their economies. It is my determination that the resource values and Federal objectives on the BLM lands are less than the resource values and Federal objectives gained by acquisition of the non-Federal lands and, therefore, this land exchange is in the public interest, and does not significantly conflict with established management objectives on adjacent Federal lands.

(ROD at 3.) The District Manager stated as follows concerning "management considerations," many directly involving the land exchange:

Based upon a careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division, U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA. Development of a landfill at a previously disturbed site and adoption of mitigation measures ensures that all reasonable means to avoid or reduce environmental harm have been incorporated into the Project. It is my determination that the acquisition of non-Federal land exceeds the value of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

(ROD at 8.) The District Manager went on to list and discuss 18 separate factors that he considered in arriving at that decision. He concluded, inter alia, that both the land exchange and rights-of-way conformed with the CDCA Plan of 1980, as amended (ROD at 8); that the land exchange presented an opportunity for BLM to achieve better management of Federal lands by allowing it to consolidate Federal ownership of habitat for listed species (Id. at 8-10); 18/ that the Project was consistent with State and

18/ The benefit to protection of threatened and endangered species of plants and animals is one of the most significant public benefits of the

exchange. BLM elaborated on these benefits. As to Group A, it stated:

"One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper

local programs, plans, and policies, such that "the needs fulfilled and the benefits provided by the landfill as defined by the County and analyzed in the Final EIS/EIR do not conflict with any Federal laws or regulations and that there are no overriding Federal considerations which warrant denial of the land exchange or issuance of right-of-way grants for the landfill" (Id. at 10-13); that, "[g]iven the mitigation and monitoring provisions as well as the analysis of impacts, * * * all reasonable and practicable means have been taken to avoid or reduce adverse impacts from the Project on JTNP," and that "the subsequent project with mitigation will not significantly conflict with the management objectives in guidances [sic] and management plan for the nearby JTNP" (Id. at 13-14); that "[i]mplementation of the required mitigation measures will result in the avoidance or substantial reduction of the environmental impacts to desert tortoise and desert pupfish" (Id. at 16); that, "after implementation of the mitigation and monitoring measures, all practical means have been taken to avoid or reduce the potential for impact to groundwater quality," and that "the Project will not result in overdrafting the groundwater" (Id. at 16); that, "[a]lthough the nature of the United States' interest [in the 460.63 acres within and around the campsite area] is actually less than a full fee

fn. 18 (continued)

rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23[, T. 8 S., R. 11 E., S.B.M.,] contains desert pupfish habitat along a tributary to Salt Creek."

(ROD at 9.) As to Group B, it stated:

"These lands are in an area designated by [FWS] as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep." Id. As to Group C, it stated:

"One of the management objectives of [the Chuckwalla Bench] ACEC is to acquire all private lands within the boundary of the ACEC primarily for management of desert tortoise habitat. This area supports one of the four major populations of the desert tortoise in California. The parcels contain Category I tortoise habitat with a density of 20-50 individuals per square mile. * * * Acquisition of Kaiser's parcels in this area would contribute to consolidating Federal lands, thereby enhancing management of important desert tortoise habitat."

(ROD at 10.) Finally, as to Group D, it stated:

"Tortoise densities are estimated to be 20-50 individuals per square [mile]. Many signs of tortoise were observed on this parcel when transects

were run for the biological assessment prepared for the landfill.
Acquisition of this parcel would contribute to BLM's management goals of consolidating ownership of Federal lands and habitat for sensitive species."
Id.

interest, * * * for purposes of appraising the value of this interest, the appraiser should value the interest as unimproved patented lands in fee (exclusive of improvements)," and that "[t]his conservative methodology would favor the United States by increasing the compensation that BLM would receive from Kaiser in exchange for these property rights" (Id. at 18-19); that title to lands patented under Priv. L. 790 had not reverted to the United States (ROD at 19-20), that the reversionary interest held by the United States in those lands was an "interest" that could be transferred to Kaiser in the exchange (ROD at 20), and that rights-of-way issued under Priv. L. 790 had not terminated; and that the Project involved the "irreversible and irretrievable commitments of resources" in the form of land, but that, in view of the facts that the land had already been subject to "very severe disturbances from over 40 years of mining activities" causing an existing irreversible change in the land and that "development of a landfill at a previously disturbed site, such as Eagle Mountain, avoids significant adverse impacts of locating a landfill in an area not previously disturbed," such "irreversible and irretrievable commitments of resources" were "not sufficient to warrant disapproval of the land exchange or rights-of-way or the selection of another alternative." (ROD at 22.)

The ROD also contains a finding that "all practicable means to avoid or reduce environmental harm have been adopted." (ROD at 23.) The CDDO Manager also described three "special measures," including (1) an "Environmental Mitigation Trust" funded by a \$1-per-ton contribution, the proceeds of which will allow acquisition, restoration, maintenance, and preservation of open space lands, as well as support research and education concerning conservation of natural resources and monitor the long-term effects of the Project on the desert ecosystem; (2) a "Citizens Oversight Committee," to be established by the County to oversee implementation of the landfill and to function as a "watchdog" regarding conditions imposed on the Project; and (3) the NPS/Kaiser/MRC agreement. (ROD at 23-24.)

The State Director, in denying protests against the proposed exchange, held:

Based on the foregoing and the documentation contained in the case record, I have determined that the [ROD], dated September 25, 1997, issued by the Authorized officer of the [CDDO], is in accordance with the regulations found in Title 43 Code of Federal Regulations 2200. I conclude that the public interest will be well served by completion of this exchange transaction and your protest is hereby dismissed.

(State Director's Decision dated Dec. 9, 1998, dismissing the Charpieds' protest.) 19/ The State Director also held as follows, in response to the Charpieds' assertion in their protest that the exchange of lands and right-of-way grants are not in the public's best interest:

The public interest will be well served by the land exchange. Acquisition of private lands will consolidate

19/ Similar language appears in the Dec. 9, 1998, decision dismissing NPCA's protest.

150 IBLA 330

Federal ownership in areas designated by [FWS] as critical habitat for the threatened desert tortoise and enhance management of habitat for the endangered desert pupfish. Conveyance of the public lands would serve the needs of State and local people as identified by Riverside County. A determination was made that there is no significant conflict with management objectives on adjacent lands, which are managed by BLM.

(State Director's Decision dated Dec. 9, 1998, dismissing the Charpieds' protest at 4; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 3.)

Section 206(a) of FLPMA provides:

A tract of public land or interests therein may be disposed of by exchange by the [Secretary of the Interior] under this Act * * * where the Secretary * * * determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary * * * shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary * * * finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1994). 20/ In deciding what is in the public interest, BLM, as the authorized officer of the Department, is required to fully consider

the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not

20/ We note that the language of the statute, itself, compels rejection of NPCA's argument (NPCA SOR at 2, Reply Brief at 3) that the standard should be whether the "national" interest justifies proceeding with the exchange. It is clear that, in assessing whether the "public interest" may be "well served" by completing an exchange, the use to which the selected public lands will be put by the private party is an important concern. The present case is a good example, where, as a result of granting the exchange, municipalities will have landfill capacity into the next century. This is in addition to the more direct benefit whereby habitat for protected species will be preserved in public ownership. The fact that private parties will profit from an exchange does not disqualify it. BLM has adopted a general policy of disposing of lands suitable for waste disposal to private concerns

in order to avoid exposing the Federal Government to potential liability.
See ROD at 8. We perceive no grounds to upset that policy, provided that,
as here, disposal of such lands complies with relevant authority.

150 IBLA 331

limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that * * * [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b); see City of Santa Fe, 103 IBLA 397, 399-400 (1988).

While BLM is required to consider this diverse range of factors in determining whether the public interest will be well served by the exchange, it has discretion to decide how to balance all of the statutory factors when making a public interest determination. See National Coal Ass'n v. Hodel, 825 F.2d 523, 532 (D.C. Cir. 1987); Lodge Tower Condominium v. Lodge Properties, Inc., 880 F. Supp. 1370, 1380 (D. Colo. 1995); National Coal Ass'n v. Hodel, 675 F. Supp. 1231, 1245 (D. Mont. 1987), aff'd, 874 F.2d 661 (9th Cir. 1989); Burton A. McGregor, 119 IBLA 95, 103 (1991); John S. Peck, 114 IBLA 393, 397 (1990). We hold that BLM has properly exercised that discretion herein. Although disposal of the selected public lands favors fulfillment of the public need for waste disposal and expansion of the Project community, BLM made every effort to balance those effects by securing important protective concessions in the manner in which the Project will be operated. Further, the acquisition of the offered private lands will provide important habitat to balance any harm to wildlife interests. The record contains ample justification for its conclusion that the public interest will be well served by making this exchange.

As noted above, contrary to NPCA's assertions (Reply Brief at 3), BLM's decision documents and supporting Draft and Final EIS/EIR contain extensive discussions of the factors set out in 43 C.F.R. § 2200.0-6(b). That record shows that the acquired private lands have substantial value as habitat for threatened and endangered species, so that acquiring them serves the purpose of protection of fish and wildlife habitats. The position of those lands relative to current Federally-owned habitat means that their acquisition will allow for more logical and efficient management and development. We also recognize that, apart from the direct benefits of acquiring the parcels of offered private lands, approval of the exchange promotes the Project, which undeniably meets the "needs of State and local residents and their economies" by allowing both a 100-year waste disposal facility for a major metropolitan area, as well as economic development of

the Project area. BLM may properly consider these factors as part of its obligation to promote multiple-use values, to fulfill public needs, and to expand communities.

150 IBLA 332

Under section 206(a) of FLEMA, the Department must also find "that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired." There is no doubt that the Federal lands and interests to be conveyed here (the selected public lands) have been greatly reduced in value due to their proximity to Kaiser's mine and its spoil piles, tailing ponds, etc. (Appraisal Report Vol. I at 9-13.) 21/ Further, these lands are encumbered by mining claims held by KEM, such that they may be mined or even patented. Id. at 15. Against this background, it is evident that disposal of these lands in exchange for wildlife habitat plainly entails a net gain for the public.

Significant impacts of the Project on JTNP or the desert tortoise or other significant impacts could tip the balance against a determination that the public interest would be well served by approval of the land exchange. With only three exceptions, the EIS/EIR found that there will be no significant impacts, following mitigation measures. 22/ We are satisfied, based on the involvement of NPS and FWS officials throughout BLM's consideration of this matter, that these remaining impacts are not great enough to compel a finding that the public interest will not be well served by approval of the land exchange.

The Charpieds assert that the Project will adversely impact the Chuckwalla Basin aquifer, a fact that, if proven, would call into question BLM's holding that the public interest will be well served by approval of the exchange. BLM fully addressed the question of the effect of the Project on the groundwater. We are satisfied that BLM properly concluded the Project, if constructed as designed, will not result in pollution of the underlying groundwater and that, any failure of the groundwater

21/ We reject NPCA's assertion that BLM somehow failed to address the "value of the selected public lands to the wildlife, wilderness, scenic, recreational and cultural interests of" visitors to JTNP. (NPCA Reply Brief at 5.) BLM's Appraisal Report thoroughly describes the selected public lands, and it is evident from that description that, due to their proximity to the abandoned iron ore mine, they have no value as parklands. By determining in the Appraisal Report that their highest and best use was for sale for commercial purposes, BLM tacitly so concluded.

22/ The EIS/EIR acknowledged that the "projected increases in air emissions within the South Coast Air Basin resulting from the long-distance transport of solid waste and the incremental increase of emissions in the Southeast Desert Air Basin cannot be entirely avoided," and that "[i]mpacts to the California leaf-nosed bat and the Townsend's big-eared bat cannot be mitigated to below the level of significance," even with "the implementation of mitigation measures." (Draft EIS/EIR at ES-17.) Further, noting that significance criteria could not be defined to quantify impacts on "intangible components of the wilderness experience (e.g., peace, solitude)," and that CEQA requires a mandatory finding of significance in the absence of significance criteria, the EIS/EIR found accordingly that

impacts to the intangible components of the wilderness experience would be significant.

150 IBLA 333

protection system can be identified in time to prevent catastrophic damage to or destruction of that irreplaceable asset. 23/

23/ Most of the waste materials received at the site (as much as 16,000 tons per day) would be hauled there in sealed and locked containers by rail, after processing at transfer stations (known as "Materials Recovery Facilities") in surrounding communities. The remainder (4,000 tons) would come by truck. The waste materials would be routinely screened prior to receipt at the site and periodically screened at the site, in order to ensure the removal of all excluded wastes. Also, all recyclable materials not previously removed would be removed and processed at a recycling center, which would also be operated at the landfill site. (Draft EIS/EIR at 1-6.)

The waste materials would be spread in the mine pit and covered with either (1) interim cover, in turn consisting of either a daily cover at least 6 inches thick (placed and compacted over waste at the end of each day's operation) or an intermediate cover at least 1-foot-thick (for areas that will not accept additional waste for at least 180 days) (Draft EIS/EIR at 2-34), or (2) final cover, which will overlie all of the accumulated waste and would consist of a 2-foot-thick foundation, a 40-mil flexible geomembrane (plastic liner) with a maximum hydraulic conductivity of 1×10^{-9} cm/s, a geotextile cushion layer, a 1-foot-thick soil protection layer, a geotextile filter layer, and a 2-foot-thick erosion layer consisting of cobble- and boulder-sized material with an average particle diameter of about 18 inches. (Draft EIS/EIR at 2-38.)

In order to prevent the migration of leachate (liquid containing contaminants) to groundwater during landfill operations and thereafter, the entire waste disposal area will be lined with a high-density polyethylene geomembrane (plastic) liner, with a thickness of 80 mils, underlain by a low-permeability soil liner with a hydraulic conductivity of not more than 1×10^{-7} cm/sec and a thickness of at least 2 feet, and covered by a geotextile cushion layer. (Draft EIS/EIR at 2-26 to 2-28, Fig. 2-9.)

Further, to avoid any buildup of leachate on top of this composite liner, a leachate collection and removal system (LCRS) would be placed above the liner. Any leachate would be collected in a blanket layer of permeable drainage material (LCRS gravel), beneath a protection soil layer and geotextile filter fabric, removed by drainages to sumps, and pumped for treatment. (Draft EIS/EIR at 2-29 to 2-30, 2-40 to 2-42, Fig. 2-11.)

Landfill gas (primarily methane and carbon dioxide produced by bacterial activity associated with decomposing waste materials) will be removed from the landfill site through a horizontal grid of pipes laid at various levels in the layers of waste mass overlying the composite liner and/or vertical wells drilled down through those layers. Upon removal, the gases would be burned (flared). (Draft EIS/EIR 2-30 to 2-34; 2-41 to 2-42.)

In addition, in the base area, detectors would be placed in a "vadose zone" as required by California law. (Draft EIS/EIR at 4.1-11.) An unsaturated zone liquid monitoring layer (UZLML) will be placed below the composite liner but above another geotextile cushion and geomembrane liner and a 1-foot-thick foundation layer (Draft EIS/EIR Fig. 2-9), for the purpose of detecting any failure of the landfill containment system. There will also be an unsaturated zone gas monitoring system (UZGMS) below the UZLML. (Draft EIS/EIR at 2-56.) The UZGMS will consist of a series

of small-diameter pipes with perforated zones at points under the landfill. These systems would monitor the migration of any landfill gas and leachate so that steps could be taken to remove them.

150 IBLA 334

The Charpieds also fail to show error in BLM's finding on the separate question of whether satisfying the Project's demands for water will permanently place the Chuckawalla Basin aquifer in deficit. BLM, relying on its experts, found that the Project, will not use so much water that the water table would be reduced to the point where the Charpieds would lose the use of their irrigation well. The Charpieds present their own expert's opinion stating that BLM has overestimated the availability of water in the aquifer and point out that the level in their water well (which, they assert, BLM has not monitored) is declining, showing that the aquifer is already in deficit. Professional disagreement by an appellant's expert witnesses with the findings and conclusions reached by BLM decision makers is insufficient to overturn a BLM decision. Riddle Ranches, Inc. v. Bureau of Land Management, 138 IBLA 82, 102 (1997); Sierra Club, 104 IBLA 76, 84 (1988).

The Charpieds (Charpieds' SOR at 4, 17-19) and NPCA (NPCA SOR at 4) both argue that the fact that the rail line right-of-way runs across the offered private lands reduces their value for habitat purposes, thus suggesting that the exchange will not, as BLM held, "secure" the "important objective" of "protection of fish and wildlife habitats" under 43 C.F.R. § 2200.0-6(b). The record demonstrates that BLM and FWS studied the potential impacts of operation of the rail line on wildlife habitat in connection with mitigation measures that would apply to those operations. (ROD at 14-15; FWS Biological Opinion at 16-23.) FWS stated as follows:

[FWS'] Biological Opinion strikes a balance between minimizing the risk of injury from train traffic and fragmenting tortoise habitat and populations. The approach consists of two years of preconstruction monitoring * * * to determine baseline conditions and a minimum three-year survey/monitoring period during project operations * * *. Data obtained by these surveys would be provided to [FWS] and BLM so that the agencies could design an appropriate culvert/tortoise fence system to (1) protect tortoise from risk of train traffic, and (2) facilitate tortoise movement across (under) the railroad tracks. The survey data would be used to customize a culvert/fence design that best reflected tortoise distribution and movement needs along the railroad track. To further minimize potential risk of injury from train traffic, and for a minimum of three years, an approved biologist would precede each train trip to remove any tortoises on or adjacent to the railroad tracks. Tortoise observations would be plotted to document important use areas and refine the design of the culvert/drift fence system.

(Memorandum dated Sept. 30, 1998, from FWS to California State Director, at 2.) The Board of Land Appeals does not have authority to review the merits of biological opinions issued by FWS under authority of section 7 of the ESA, 16 U.S.C. § 1536 (1994). Thus, an FWS Biological Opinion is not subject to administrative review as to the matters decided therein. Southern Utah Wilderness Society, 128 IBLA 52, 60-61 (1993); Lundgren v.

Bureau of Land Management, 126 IBLA 238 (1993). We accordingly accept the Biological Opinion's finding that impacts to the desert tortoise from train traffic will be effectively minimized. We are not persuaded that

150 IBLA 335

any adverse impacts to the desert tortoise from completion of the Project have been disregarded, such that approval of the exchange would not benefit acquisition of habitat.

We reject appellant NPCA's argument (NPCA SOR at 5-6, Reply Brief at 4-5) that BLM was required by 43 C.F.R. § 2200.0-6(b) to make a finding whether the "intended use of the conveyed Federal lands" would "significantly conflict with established management objectives on" JTNP as "adjacent Federal lands." The closest point between the selected public lands and JTNP is in the NE¼ sec. 11, T. 4 S., R. 14 E., San Bernardino Meridian. There is a strip of lands between the selected public lands and the JTNP lands. See ROD Ex. B. Thus, the selected public lands (conveyed Federal lands) are not "adjacent to" any JTNP lands. As noted above, BLM's decision documents fully treat the question whether and to what extent the land exchange will conflict with JTNP. However, BLM is not required by regulation to find that the intended use of the selected public lands as a landfill does not significantly conflict with established management objectives on JTNP.

The Charpieds assert that the selected public lands were not "categorized for disposal" (Charpieds' SOR at 4), thus suggesting that the exchange "significantly conflict[s] with established management objectives on adjacent Federal lands" in violation of 43 C.F.R. § 2200.0-6(b). We reject that contention. Under 43 C.F.R. § 1610.5-3(a), "[a]ll future resource management authorizations and actions * * * shall conform to the approved plan." Moreover, it is clear that a land exchange, as a resource management action, is not barred because the governing plan does not "expressly provide for" the exchange. Under 43 C.F.R. § 1601.0-5(b), "[c]onformity or conformance means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." (Emphasis supplied.) Under 43 C.F.R. § 1601.0-5(c), "[c]onsistent[]" means that [BLM] plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans." Therefore, the "exchange need not be specifically mentioned, so long as it is clearly consistent with the plan." Northern Plains Resource Council v. Lujan, 874 F.2d 661, 669 (9th Cir. 1989).

BLM, following 43 C.F.R. § 2200.0-6(b)(2), correctly held that "[t]he adjacent Federal lands are managed by the BLM under the Plan and are designated as Class M [(moderate use)] to the south and east and Class I [(intensive use)] to the north of the Project." It expressly determined that the Project "does not conflict with the current uses or uses allowed by the CDCA Plan for the adjacent Federal lands" managed by BLM under the CDCA plan. (ROD at 8; State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 4; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 3.) That conclusion is supported by the case record, which shows that the lands that are adjacent to the exchanged lands are Federal public domain lands that, owing to their proximity to the historically active mining area, have been made available for use rather

than placed within JINP.

Further, the CDCA Plan provides that areas designated as Class M or Class I "will be acquired, disposed of, or exchanged in accordance with

150 IBLA 336

FLPMA and other applicable Federal laws and regulations, to assure more efficient management of the public lands and to reduce conflicts with other public and private landowners to provide more consistency and logic in desertwide land use patterns." (CDCA Plan, § II.B.11.) Further, as BLM noted in the ROD, granting the land exchange and rights-of-way conforms with the CDCA Plan of 1980, as amended. Although the current guidelines (Amendment 4 of the 1985 Amendments to the CDCA Plan) dictate that "Federal lands managed by BLM may not be used for waste disposal (either hazardous or non-hazardous)," 24/ they nevertheless provide that "[l]ocations suitable for waste disposal, when found on BLM managed Federal lands, will be transferred to other ownership through sale or exchange." (ROD at 8 (emphasis supplied).) The lands, having been found suitable for waste disposal, were categorized in the CDCA Plan for transfer out of Federal ownership via exchange. Disposal of these lands via exchange is clearly "consistent with" the CDCA Plan.

Appellants cite statutes that, they assert, require that the resources of JINP be left unimpaired. None of these statutes is of comfort to them. The California Desert Protection Act, 16 U.S.C. § 410aaa-21 (1994), was enacted against a background clearly showing Congressional intent that the Project not be impeded by that legislation. The House Natural Resources Committee Report contains the following statement:

The Committee recognizes that there is a proposed Eagle Mountain solid waste disposal facility which, if developed, would be located at the site of the defunct Kaiser iron ore mine with approximately 1.5 miles of the Joshua Tree National Park. It is not the intent of the Committee that this legislation have any effect on the future development of this disposal facility at that location, and [the Committee] does not expect that such development will be affected by the site's proximity to the park or wilderness within the park. The Committee notes that any such development will first have to meet the requirements of various federal, state, and local laws and regulations in order to be licensed; the Committee does not intend that this legislation be construed so as to impose additional regulation, beyond such current federal, state and local laws or regulation, based on the mere fact that the Eagle Mountain site is in close proximity to the park or wilderness within the park, should this facility be located at that site.

H. Rep. No. 103-496, May 10, 1994. The National Park Service Organic Act of 1916, as amended, 16 U.S.C. § 1 (1994), establishes NPS' mission and role, but does not impose specific legal requirements or restrictions on the management of Federal lands outside the jurisdiction of the NPS. In any event, it cannot be denied that BLM fully complied with the directive that "unique characteristics of the geographic area such as proximity to * * * park lands" must be considered in evaluating impact significance. 40 C.F.R. § 1508.27(b)(3).

24/ This policy was adopted to avoid placing the Federal Government in a position where it might be liable for damages resulting from operating a waste disposal facility.

150 IBLA 337

The Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994), as amended, of course, does impose restrictions on the treatment of lands designated as wilderness. ^{25/} However, the record shows that the EIS/EIR carefully took into account those restrictions in evaluating the Project's impacts. See Draft EIS/EIR at Secs. 3.11 and 4.11. The only effects identified on the "wilderness as a resource" are that the Project will be "noticeable during operation and after final closure to some locations within * * * the JTNP wilderness areas," and that "a small amount of windblown debris could be transported within the JTNP boundaries." (Draft EIS/EIR at 4.11-13 to 4.11-14.) The record shows that there is a community to the west of the project (Draft EIS/EIR Fig. 3.11-9) and mountains to its north and west. (Draft EIS/EIR Fig. 3.1-9.) There are 1- to 3-mile nonwilderness strips both to the south and northwest of the Project. (Draft EIS/EIR Fig. 3.11-9) All of these features effectively buffer the Project site from wilderness lands in the eastern part of JTNP and to the north of

^{25/} The majority of lands within JTNP are designated as wilderness. (Draft EIS/EIR at 4.11-2.) The Charpieds (Charpieds' SOR at 24-25) challenge BLM's decision to apply less strict noise standards for those lands that are not wilderness. (Draft EIS/EIR at 4.13-1 to 4.13-2.) Wilderness is, by definition, an area where "the imprint of man's work [is] substantially unnoticeable." See 16 U.S.C. § 1131(c) (1994). BLM adoption of a stricter noise standard for wilderness is consistent with its obligation to administer those lands "in such a manner as will leave them unimpaired for future use and enjoyment as wilderness." See 16 U.S.C. § 1131(a) (1994). No such nonimpairment mandate exists for the nonwilderness lands.

The Court of Appeal ruled on this issue. It noted the "evidence of human development" found in the nonwilderness lands in JTNP and the "County's acceptance of different thresholds of significance for impacts upon different areas of [JTNP,] depending on [their] level of wilderness." NPCA II, supra at 18. It held:

"We conclude that for purposes of analyzing the various 'wilderness experience' components, there is substantial evidence in the record to support the approach taken by the [EIS/EIR] and the County, to distinguish the significance of impacts according to the scientific and factual data gathered about the nature of the land affected: wilderness or nonwilderness." Id. at 19-20. The Court of Appeal also ruled that "the record does not support any claim that no impacts from the project, whether significant or not, whether in a wilderness area or not, should be allowable, merely because of the proximity of the project to" JTNP. Id. at 20. It also noted that "the significance of an activity may vary with the setting" and specifically ruled that "the County had a substantial basis for accepting the [EIS/EIR's] use of county noise standards for assessing noise impacts" in the nonwilderness areas, as "[t]here is no requirement that all noise from the [P]roject be mitigated to a level of inaudibility, particularly as to nonwilderness parklands." Id. at 22. We find no basis in Federal law to conclude that no impacts should be allowable on nonwilderness areas of JTNP. We regard the EIS/EIR's distinction between effects on wilderness and nonwilderness lands in JTNP to be well supported by governing law.

the Project site. (Draft EIS/EIR. Fig. 3.5-3; Final EIS/EIR at 6-25.) We are accordingly convinced that visual impacts and blowing trash on wilderness lands in JTNP will be minimal. The presence of these effects does not compel reversal of BLM's finding that the public interest will be well served by approval of the exchange. Similarly, although BLM acknowledges that some individuals' subjective "wilderness experience" may possibly be impacted by the presence of the Project (Draft EIS/EIR at 4.11-14) and that there is nothing that can be done to prevent that, we do not regard such impacts as compelling reversal of BLM's decision here.

[3] Section 206(b) of FLPMA requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. 43 U.S.C. § 1716(b) (1994); 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2); See Brent Hansen, 128 IBLA 17, 19 (1993); Havasu Heights Ranch & Development Corp., 102 IBLA 1, 7-8 (1988).

The Charpieds assert that BLM undervalued the selected public lands taken by KEM in the exchange (Charpieds' SOR at 1-2), suggesting that it did not meet the requirements of 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2). NPCA also argues that BLM will not receive fair market value for the exchange. (NPCA SOR at 5-6.) It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value. See Voice Ministries of Farmington, Inc., 124 IBLA 358, 361 (1992); High Country Communications, Inc., 105 IBLA 14, 16 (1988). Appellants have submitted no appraisal here. Nor have they shown error in the methodology of the appraisal. We accordingly do not agree that the public is not receiving full value for the selected public lands. In these circumstances, the BLM appraisal is properly upheld. See, e.g., Brent Hansen, 128 IBLA at 19; City of Santa Fe (On Judicial Remand), 120 IBLA at 315; Burton A. McGregor, 119 IBLA at 105.

We specifically reject the Charpieds' argument (SOR at 1) that BLM failed to properly value the reversionary interest in the tract of land they describe as the campsite/millsite lands. ^{26/} BLM instructed the appraisers to appraise the reversionary interest in the surface estate of the tract in terms of the "fee simple estate, disregarding the [e]ffect of any title encumbrances," including the reversionary interest, and to appraise the tract "as if in a raw, unoccupied state, disregarding any of the existing improvements." (Appraisal Report, Vol. II, at iv, 4, 14.)

^{26/} Appellant NPCA argues that the offered private land (referred to as "the acquired land") "may already be federal land" because, it asserts, title had reverted to the United States, so that "the federal government may be gaining land it already owns." (NPCA SOR at 6.) Respondents (Answer at 50) point out that NPCA completely misunderstands the facts. In fact, there is no reversionary language in the deeds of any of the offered private

lands, which Kaiser owns in fee. There is, accordingly, no possibility that the Federal Government already owns any of the offered private lands.

150 IBLA 339

The record indicates that these instructions resulted from an agreement between BLM and KEM which was designed to resolve the problem of how to appraise the reversionary interest, under which KEM agreed to pay for the full fee simple title to the campsite/millsite lands even though it already held the principal interest in those lands. (Letter to BLM from KEM dated May 5, 1993.) The surface estate was patented to KSC in 1955 and was being held subject only to KEM's continued compliance with the terms of the patent. So long as it did so, KEM could hold the surface estate indefinitely, subject to the possibility of reverter. We find no fault with this compromise, and appellants have provided no basis to disturb it. To avoid even the possibility of under-valuing its reversionary interest, BLM instructed the appraiser to value that interest as if it were a fee simple interest in the surface estate of the land, that is, as if the reverter had occurred. ^{27/} This undoubtedly increased the value attributable to the reversionary interest, thus maximizing its value for purposes of the exchange and benefitting the United States by increasing the overall value of the selected public lands in the exchange.

We also reject the Charpieds' argument (Charpieds' SOR at 1) that, by disregarding revenue from improvements that have been built on the campsite/millsite lands, BLM undervalued the reversionary interest. That argument disregards the critical fact that, if the lands ever had reverted to the United States, those improvements could be removed. Such improvements and associated "revenue stream" belong to KSR and its successors, not to the United States, which has no claim to reimbursement for their value.

By the same token, the valuation of the offered private lands is not defective because it did not include the value of railroad tracks which cross the property (see Charpieds' SOR at 2), as those improvements will not belong to the United States following the exchange, but will remain in Kaiser's possession on the property under authority granted by the right-of-way. In these circumstances, it was appropriate to value the lands "as if in a raw, unoccupied state, disregarding any of the existing improvements," (Appraisal Report, Vol. III at 5, 23), as those improvements can be removed by the right-of-way holder.

The Charpieds assert that the appraisal misstates the present use classification of the selected public lands as "designated for Open Space and Conservation." (Charpieds' SOR at 1-2.) We are unable to find such statement, and the Charpieds provide no citation. The Appraisal Report expressly states to the contrary that the selected public lands were

^{27/} We do not agree with the Charpieds that, by setting the value of the campsite as the value of the fee simple interest of that tract, BLM admitted that the lands had reverted to public ownership. (Charpieds' SOR at 3.) Nor do we view BLM's listing of these lands as "selected public lands" on the appraisal report as an admission that the lands had reverted. (Charpieds' SOR at 10.) Contrary to the Charpieds' suggestion, the ROD makes clear that KEM is selecting the "Federal Reversionary Interest" in

these lands. (ROD, Ex. A-1, p. 3.) We see nothing remotely suggesting that BLM has ever admitted that title to the lands has reverted to the United States.

150 IBLA 340

"appraised based on [their] estimated highest and best use as if available in the open market, in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and [CDCA] Plan land use recommendations" (Appraisal Report Vol. I at 43-44), concluding, in view of the absence of "imminent development potential," that "the highest and best use of the selected public lands is estimated to be holding for speculative investment and future capital appreciation." Id. at 47.

The Charpieds argue that the Notice of Exchange Proposal (NOEP) violated 43 C.F.R. § 2201.2(a)(1), because it failed to name Kenneth Statler as a party "involved in the present exchange." (Charpieds' SOR at 2.) Appellants have failed to show that Statler, who apparently at one time held a leasehold interest in a portion of the campsite lands that has now expired, owns any interest in the lands involved in the exchange. Accordingly, we agree with KEM that he is not "involved in the present exchange" and need not have been identified under 43 C.F.R. § 2201.2(a)(1). Nor did the NOEP need to mention MWD (Charpieds' SOR at 20), which is not a participant in the exchange, but is instead the grantee of a right-of-way.

The Charpieds also argue that the NOEP violated 43 C.F.R. § 2201.2(a)(2) by not identifying 400 acres of desert tortoise habitat that KEM will donate to BLM. That "donation" is actually being made as mitigation for the expected loss of desert tortoise habitat caused by the widening of Eagle Mountain Road. We agree with KEM that it was not required to list those lands in the NOEP because, at the time of the preparation of that document, the extent of loss of habitat was not known and could not have been accurately foreseen. At this time, KEM has committed itself (as a condition of the land exchange agreement) to purchase 400 acres of tortoise habitat and donate it to the United States for preservation to mitigate expected damage to 160 acres of tortoise habitat resulting from the widening of Eagle Road. We find nothing impermissible in that. The valuation of the selected public land and offered private lands are not affected. Public involvement in this process can await the execution of the arrangement,

Both NPCA and the Charpieds argue that BLM erred by failing to take into account that title to the campsite/millsite lands had reverted to the United States because the terms of the reverter in the patent had occurred. Indeed, they presume that title to the lands has reverted and make further assumptions accordingly. See, e.g., Charpieds' SOR at 2-3 (asserting that KEM's occupancy of these lands is trespass, and challenging the legality of a lease of surface rights issued by KEM to Statler). In view of the fact that BLM has agreed to deed its interest in the lands (whatever it may be) to KEM, this land exchange will resolve these questions once and for all. 28/ As noted above, BLM has valued the campsite/millsite lands as if the land had already reverted to the United States. This moots the question of whether title to the lands has, in fact, reverted. In other

28/ We find nothing improper in BLM's choosing to use the land exchange

authority of FLPMA to accomplish this goal instead of the recordable disclaimer authority, as suggested by the Charpieds. (Charpieds' SOR at 10.)

150 IBLA 341

words, since BLM has received the same value for the lands as it would have if the lands had reverted to the United States, it is unnecessary to consider whether the lands have or have not actually reverted to the United States, because the United States is in the same position either way.

Nevertheless, we affirm BLM's finding that the lands have not reverted. (ROD at 19; State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 5; see also State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 4.) The record shows that these lands were patented to KSC pursuant to the Act of July 8, 1952, Priv. L. 790, 66 Stat. A129, on Aug. 9, 1955, pursuant to Patent Los Angeles 0121702, and that the patent contains the following provision:

PROVIDED, That said property shall revert in fee to the United States in the event that said property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of said Kaiser Steel Corporation or its successors in interest.

Even if, upon the happening of an event named in the reverter, the estate automatically terminates and the property reverts to the grantor or his successors-in-interest without the necessity for re-entry (see State of Wyoming, 27 IBLA 137, 164, 83 I.D. 364, 383 (1976) (AJ Frishberg, dissenting), aff'd, 602 F.2d 1379 (10th Cir. 1979)), there must be a finding that the event has, in fact, happened. Such a finding by BLM is ordinarily the necessary first step in the Department's effectuating a reversion. See, e.g., Sky Pilots of Alaska, Inc., 40 IBLA 355, 365 (1979); City of Monte Vista, Colorado, 22 IBLA 107, 114 (1975); Clark County School District, 18 IBLA 289, 297-98, 82 I.D. 1, 5 (1975). ^{29/} BLM has not made such a finding here, and has affirmatively held that "the reversionary interests of the United States have not been triggered." (ROD at 19.) We agree.

California law governs disposition of this question, since Congress did not indicate in Priv. L. 790 that it intended for Federal law to apply. See State of Idaho v. Hodel, 814 F.2d 1288, 1293 (9th Cir.), cert. denied, 484 U.S. 854 (1987). Under California law, "there is a general legislative and judicial hostility to divestiture of properties long held by grantees." Id. at 1291. The California Civil Code provides that "[a] condition involving forfeiture must be strictly interpreted against the party for whose benefit it is created." Cal. Civ. Code § 1442. In accordance with this general policy, forfeiture and reversion provisions in deeds and patents are "construed liberally in favor of the holder of the

^{29/} The Charpieds and NPCA both argue that BLM lacks authority to determine whether the reverter has taken place, and that the reverter has occurred automatically, despite BLM's lack of action. We note that, although a party with standing to raise the issue could presumably sue in a court of competent jurisdiction either to gain a declaratory judgment that title had reverted or to quiet title based on the operation of the reverter, that has

not happened.

150 IBLA 342

estate, and construction which avoids forfeiture must be adopted if at all possible," such that "[e]ven a breach of a condition may not result in forfeiture if the grantee has 'substantially complied' with the terms of the conveyance." State of Idaho v. Hodel, 814 F.2d at 1292.

The question examined by BLM is whether KSC and KEM, as successor to the grantee of Patent Los Angeles 1153422, failed to use the patented lands for a continuous period of 7 years as a campsite or millsite or for other incidental purposes in connection with the mining operations of KSC or its successors-in-interest. The State Director, in dismissing the Charpieds' protest, found at page 5 that "Kaiser has continued to make shipments of ore and other mineral materials and engaged in other activities incidental to mining at the site," and the record supports that finding. Although extraction and processing activities have ended, KEM has continued to use the land to coordinate the sale and shipment of iron ore and other materials that were generated during the mining process 30/ and to coordinate the annual assessment work on unpatented mining claims in the area, as well as to support reclamation work on the minesite. That unquestionably amounts to using the lands "for incidental purposes in connection with mining operations." 31/

Nor do we accept the Charpieds' argument (Charpieds' SOR at 11) that the devotion of a portion of the lands to a use unrelated to mining (as a privately-owned correctional facility) triggered the reverter. The language of the reverter makes it clear that, for the reverter to operate, there must be failure to use the site for purposes incidental to mining;

30/ Respondents assert that, "[w]hen mineral extraction and processing activities were discontinued in 1983, hundreds of millions of tons of mining products were stockpiled at the site, including pelletized iron ore concentrates, aggregate, rip-rap, crushed rock, and decorative rock. Rather than abandoning those valuable assets, Kaiser assembled, loaded-out and shipped more than 130,000 tons of iron ore, 64,000 tons of aggregate, and 394 tons of riprap from the Eagle Mountain site to various locations between 1985 and 1992. Each shipment involved the use of the campsite and Kaiser personnel and equipment located there. In addition, Kaiser also used the campsite to process and ship several tons of coarse ore and pelletized ore from the mine in March and April of 1993."

(KEM/MRC Answer at 39-40 (citations omitted).) Appellants have not disputed these facts. Those activities were sufficient to extend KEM's title in the lands at least through April 2000, since, as Respondents point out, there has not been a continuous period of 7 years in which Kaiser failed to ship iron ore or other mineral materials from the minesite.

31/ Neither KEM's asserted failure to seek permission for "mining activities" nor its failure to gain mining permits are relevant to the question of whether the reverter occurred. We note, however, that the Charpieds' evident presumption that KEM must have engaged in "mining" to avoid the operation of the reverter is incorrect. KEM did not have to engage in "mining" or "mining operations" to avoid the reverter; it simply had to use the lands "for incidental purposes in connection with mining

operations," something it clearly did when it sold and shipped previously-mined iron ore or other mineral materials.

150 IBLA 343

use of a small portion of the lands for other purposes than mining does not trigger the reverter where the site is also used as required. Finally, we reject the Charpieds' argument that title to these lands somehow reverted to the United States when KSC went bankrupt. (Charpieds' SOR at 12-13.) The patent was issued to "Kaiser Steel Corporation and to its successors," thus obviously including KEM and other entities that may have succeeded to KSC's title following its bankruptcy.

The Charpieds also argue that right-of-way IA-0121701 (issued to KSC in June 1956 to allow access to the iron ore mining operation, also under authority of the Act of July 8, 1952, supra) reverted to the United States. (Charpieds' SOR at 4.) Even assuming arguendo that the reversion occurred, there is nothing preventing BLM from issuing a new right-of-way for other purposes. BLM has the authority to do so under FLPMA, and the records establish that its decision was within its authority. We reject the argument that activities undertaken on the right-of-way were unauthorized, as the record shows that right-of-way IA-0121701 was in effect during the time in question. 32/

The decision whether to proceed with a proposed land exchange, especially the determination whether it is in the public interest, is committed, by section 206(a) of FLPMA and 43 C.F.R. Part 2200, to the discretion of BLM. 43 U.S.C. § 1716(a) (1994); 43 C.F.R. § 2200.0-6(a); San Carlos Apache Tribe, 149 IBLA 29, 48 (1999); Antonio J. Baca, 144 IBLA 35, 36-37 (1998); Barrett S. Duff, 122 IBLA 244, 247 (1992). It will not be overturned unless the party challenging it demonstrates that it is contrary to the law, arbitrary and capricious, not supported on any rational basis set forth in the record, or, for any reason, not in accordance with the public interest. Brent Hansen, 128 IBLA 17, 21 (1993). Appellants have not met that burden here.

32/ In any event, we are not persuaded that the events that would invoke the reverter of the right-of-way have occurred. The right-of-way grant provides that it must be used for "constructing, operating, and maintaining any and all works, structures, facilities, roads, railroads, power lines, and pipelines necessary, convenient, incidental, or appurtenant to the operation of the mines, camp sites and mill sites." It provides further that it "shall be subject to reversion if the rights are abandoned or not used for a continuous period of seven years by [KSC] or its successors in interest." It is plain from this language that any acts taken to operate or maintain facilities appurtenant to operation of the mine will avoid the reverter. There is no doubt that such activities have occurred on the right-of-way throughout the period in question. The use of the right-of-way to carry shipments of iron ore via rail is sufficient, by itself, to prevent it from reverting.

Contrary to the Charpieds' suggestion (Charpieds' SOR at 5), those activities were not "new activity," but were undertaken pursuant to existing authority of right-of-way IA-0121701. We are not aware that that right-of-way ever terminated.

[4] The State Director stated as follows concerning issuance of the two rights-of-way:

Additionally, it is my decision to issue two (2) right-of-way grants [(CACA 35594 and CACA 31926)] under the authority of and in accordance with Title V of [FLPMA], as amended, to [KEM] to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants is issued to [KEM], the other issued jointly to [KEM] and the [MWD]. The rights-of-way will be used in connection with the transportation of waste to the landfill site.

(State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 6; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 4.)

Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Department to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. See also 43 U.S.C. § 1761(a)(7) (1994). Approval of rights-of-way is a matter of discretion. John M. Stout, 133 IBLA 321, 328 (1995); Coy Brown, 115 IBLA 347, 356 (1990). The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application when the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. James Shaw, 130 IBLA at 115; Coy Brown, *supra*. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice. Kings Meadow Ranches, 126 IBLA 339, 342 (1993).

Many of the same considerations discussed above apply to BLM's decision to issue these rights-of-way. None of the indirect effects associated with the Project rise to the level that would render issuance of the rights-of-way, which make the Project possible, outside the public interest. Appellants have failed to show error in the decision to issue these rights-of-way, and we affirm BLM's conclusion that approval of these rights-of-way is in the public interest.

We note that appellants are mistaken in their assertion that "[r]ight-of-way Grant CACA-25594 was authorized under the authority of" Priv. L. 790. (Charpieds' SOR at 4.) That right-of-way was authorized under section 501 of FLPMA. The absence of authority in the Act of June 18, 1932, 47 Stat. 324 (1932) (Charpieds' SOR at 7-8), is irrelevant to the controlling question whether BLM has the authority to issue the right-of-way under FLPMA. BLM is issuing a new right-of-way under the authority of FLPMA, which supersedes the earlier grant. The fact that the 1932 Act did not authorize use of a right-of-way in connection with a landfill is irrelevant; the question is whether FLPMA authorizes such use. BLM is not "usurping" Congress' authority as granted by the 1932 Act, as the Charpieds

state; it is exercising different, independent authority under FLPMA. Nor have the Charpieds provided any evidence to support their

150 IBLA 345

apparent contention that granting the right-of-way will interfere with MWD's exercise of rights granted under the 1932 Act by polluting the water it provides to Southern California cities. (Charpieds' SOR at 7-8.)

To the extent not expressly addressed herein, appellants' arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge